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# The Judicial Power

## Overview

“It is emphatically the province and the duty of the judicial department to say what the law is”

***Original Jurisdiction*** -- SCOTUS has held that Congress does not have the authority to expand the original jurisdiction of the Supreme Court. SCOTUS has original jurisdiction in all cases arising under the Constitution, involving (1) ambassadors, (2) other public ministers and consuls and (3) cases in which a state is a party

***Supremacy Clause*** -- Marshall based Judicial Review in the Supremacy clause -- read narrowly; the clause establishes that Federal law is supreme but it does not say (1) who decides and (2) finality -- read broadly = judicial review!

* Counter-Majoritarian Difficulty -- the idea that judges, who are unelected, are the ones charged with interpreting the constitution -- opposes judicial review of legislative acts which represent the “popular will”
* The *Canon of Constitutional Avoidance* stems from the Supremacy clause and the presumption that Congress legislates in light of the constitutional boundaries of its power
  + When there are two potential readings of a statute, one which violates the Constitution and the other which does not, the Court is obliged to use the non-violating interpretation -- provided it is fairly plausible

***Political Question Doctrine*** -- Prominent on the surface of nonjusticiable political questions are generally (First two most important):

1. A constitutional commitment of the issue to a coordinate political department
2. Lack of judicially discernable standards for resolving the dispute
3. Impossibility of deciding without policy determination clearly designed for non-judicial discretion
4. Impossibility of independent resolution without expressing a lack of respect to another branch
5. Unusual need for adherence to a political decision already made
6. Potential embarrassment from multifarious pronouncements by various departments

***Extra-Judicial Constitutional Interpretation***

* Dellinger, “Presidential Authority to Decline to Execute Unconstitutional Statues
  + Argues the President has the authority to refuse to enforce unconstitutional statutes -- based in the “Take Care Clause” of Article II; “take care the laws be faithfully executed”
    - Should the clause be considered a power, a duty, or both?
  + Dellinger still embraces judicial supremacy, and argues the President should base his decision to enforce or not enforce on whether he things SCOTUS would find it constitutional or not
  + Note: Non-enforcement keeps a statute from SCOTUS due to the “case/controversy” requirement
* Presidential Signing Statements
  + Signing Statements (1) Explain the president’s interpretation of the law (2) direct subordinate officers (3) explain features of a bill thought to be unconstitutional and which will not be enforced or enforced in limited ways
  + Signing statements do not bind courts and although they could theoretically be used as legislative history, court’s have generally declined to place much interpretive weight on them
  + Example: In interpreting Senator McCain’s 2005 amendment to the Detainee Treatment Act prohibiting torture -- President Bush adds “the executive shall construe [the amendment] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief, and consistent with…limitations of the judicial power, which will assist in achieving the shard objective of protecting America

**Modes of Constitutional Interpretation**

* (1) The Text -- Orginalism requires the words to be interpreted in light of the intent and/or understand of the drafters or the common person of the era
* (2) Structural Approaches -- Determine the meaning from the overall structure and purpose of the constitution; it would otherwise be undemocratic to force the drafter’s meaning on the people when that is not what was consented to
* (3) Natural Law / Natural Rights -- Rights that are in some sense deeper than the constitution; such that it would be absurd to read the constitution as conflicting upon these rights
* (4) Other: Tradition, Precedent, Public Policy, Contemporary Mores, and/or International Norms (not exhaustive)

## Marbury v Madison—1803—SCOTUS—Marshall, J.

**Court strikes down the expansion of its original jurisdiction under the Judiciary Act of 1789; establishes judicial review**

* Every violation of a vested legal right deserves a remedy -- π is entitled to his commission, but since that remedy was based on a statute which violates the constitution, the court must strike the statute -- i.e. no jurisdiction
* The Federal government is one of enumerated, therefore limited, powers that cannot be expanded (structural) -- the written constitution is supreme to any legislative act by virtue of the Supremacy Clause (textual)

## Baker v Carr—1962—SCOTUS—Brennan

**SCOTUS considers the makeup of voting districts; sets the framework for nonjusticiable political questions**

* Unless one of the six “Baker Factors” is inextricable from the case, there should be no dismissal under the political question doctrine -- Otherwise there is no “risk of intolerable intrusion”
* Realistically, this comes into play when there is a high chance SCOTUS would be ignored anyway

## Martin v Hunter’s Lessee—1816—SCOTUS—Story

**SCOTUS considers whether is has appellate review of state court decisions, legislation, and executive actions**

* The Judicial Power of shall extend to ALL cases…arising under this Constitution, the Laws of the United States…
* The state’s quasi-sovereignty does not make them equivalent to foreign states -- state biases and loyalties could obstruct proper implementation of the constitution when uniformity is necessary and important

## Cohen v Virginia—1821—SCOTUS

**SCOTUS considers the extent of its power with regard to state cases**

* SCOTUS has the ability to review criminal cases and cases where any State is a party

## Relevant Theories of Constitutional Interpretation

* ***Orginalism --*** embodies the view that Constitutional interpretation requires discovery of meaning which was fixed at the time the Constitution was adopted; Modern beginning can be traced to Reagan’s nomination of Robert Bork to SCOTUS
  + - Critics felt Bork/Originalism provided the intellectual foundation for a broad-based rejection of the Warren & Burger Courts rationale striking down various forms of discrimination
  + Alternatives: Opponents of Orginalism take a variety of positions that are not all fully compatible with each other
* ***Natural Law*** -- For the “framing generation” *the concept of “higher law” which protects “natural rights” takes precedence over any written law* -- the constitution was simply an attempt to reduce this body to written form and therefore natural law occupies a place above the Constitution
  + If this has force, should we be bound by the framers conception of natural law or by modern conceptions of natural law or by some objective standard of natural law? Consider the difficulties in application
* ***Moral Arguments & the Search for Integrity*** -- Believes judges have the leisure, training, and political insulation to follow the ways of the scholar in pursuing government ends -- *government must serve immediate needs as well s protect certain values within judicial expertise to discern* -- Moral philosophy may play a role in providing arguments when legal materials leave gaps and uncertainties; used to make the entire system “fair & just” as opposed to the opposite
* ***Tradition*** -- Argues the constitution can accommodate changing circumstances by deriving meaning not from exegesis but by a process by which *each generation gives formal expression to the values it holds fundamental* -- judges that appeal to the constitution must show the principles which they propose are related to express provisions and are rooted in history
* ***Common Law & Consensus*** -- Constitutional law interpretation should be a common law process by which judgments emerge from particular cases rather than from fixed text of history -- in this view *“meaning” evolves as modern circumstances put pressure on old meanings and as language changes to deal with those pressures* -- in some way reflecting social consensus
* ***Representation-Reinforcement*** -- *Commitment to “deliberative democracy” should be the source of Con law principles* used to interpret the constitution; while Courts should enforce unambiguous provisions, they should interpret ambiguous provisions in light of general commitment to democratic representation
* ***Unsettlement*** -- Ambiguous *constitutional text should be read as fostering disagreement and debate about its meaning*; under this belief any constitutional settlement of political disputes is bound to produce losers who will nurse deep-seeded grievances -- on the other hand; allowing debate and the political process to work will create no losers

# Legislative Power: The Commerce Clause

## Introduction

Article I, Section VIII, Clause 3 -- **The Commerce Clause** -- “provides the power “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes

* The Commerce Clause has become the main tool by which Congress legislates

Article I, Section VIII, Clause 18 -- **The Necessary & Proper Clause** -- provides the theoretical basis for *Inherent & Implied Powers*

* McCulloch establishes Congress’s *implied powers* or those beyond the enumerated powers but that are linked to textually assigned powers and serve as means to the constitutional end
* *Inherent powers* do not depend on any textual assignment and are thought to be inherent in the concept of sovereignty -- i.e. establish a flag, immigration control, foreign investment,
* ***Analysis***: “Is the means rationally related to the implementation of an enumerated power (Comstock/ Heart of Atlanta)

**(I) Commerce Clause I: From the Marshall Court to the 20th Century**

* Beginnings of congressional regulation of interstate commerce and the national economy
* Three main questions dominated:
  + 1) Whether the subject of regulation was properly treated as interstate commerce
  + (2) Are the purposes of the regulation consistent w/ constitutionally approved ends or is the regulation a pretext to achieve an unconstitutional end?
  + (3) Does the regulation run afoul of the powers reserved to the states in the 10th Amendment?
    - Showcased by a focus on ***Dual Federalism*** -- the view that the Federal and State governments were separate sovereigns with separate zones of authority

**(II) Commerce Clause II: The New Deal and Civil Rights (Post-Depression)**

* There was a greater push for national legislative solutions to the Nation’s problems -- a period that started with SCOTUS striking major pieces of new deal legislation ended with a general relaxation of judicial constraints on the exercise of federal power -- Congressional motive becomes irrelevant to commerce analysis
* FDR’s “court-packing” plan could have helped SOCUTS become more amenable to New Deal legislation

**(III) Commerce Clause III: Modern Developments & The Rehnquist Court**

* Rehnquist becomes Chief Justice in 1987 & shares Reagan’s belief in the importance of state governments in the federal system
* Manifested in Reagan’s Executive Order No. 12,612 -- (1) political liberties are best assured by limiting the national government (2) The presumption of sovereignty should rest with the individual states, uncertainty should be resolved against regulation at the national level

**(IV) Commerce Clause IV: Modern Developments II & The Robert’s Court**

* NLRB was the most recent major expose on the Commerce clause -- all arguments must take this into account
* Most modern commerce clause statutes actually limit the range of things which may be introduced into commerce -- that requires one to rethink & expand what it means to “affect” commerce -- could it be more of a logical relationship?

*Analysis to this point*

* ***Lopez Factors***: (1) Channels of interstate commerce (2) instrumentalities of / people within interstate commerce (3) intrastate activities with a substantial relation to interstate commerce
  + Substantial Relation inquiry -- is there an (a) economic activity with a (b) substantial effect on interstate commerce
  + (1) I aggregation complications? (2) Part of a larger regulatory scheme? (3) Congressional findings about effects on interstate commerce? (4) Jurisdictional element?
    - Perfect Jurisdictional Elements -- Requires a person to be moving in interstate commerce; by satisfying the element, you place yourself directly within Congress’s commerce power
    - Imperfect Jurisdictional Elements -- One may fall within jurisdiction based on aggregation or the item being regulated, but not within the Constitutional parameters of the Commerce power

**\*\*Note: Lopez/Raich is the controlling theoretical framework, but you would be a fool not to consider Robert’s in NLRB\*\***

## McCulloch v. Maryland—1819—SCOTUS

### Challenge to the Constitutionality of the Federal Bank & State’s power to tax an instrument of the Fed.

* The N&P clause does not limit congress to only those means which are absolutely necessary, to inquire into the degree of necessity would tread on legislative grounds; the court disdains all pretentions to such power
* Let the end be legitimate and within the scope of the constitution, and all means which are appropriate, plainly adopted to that end, are not constitutionally prohibited, and are consistent with the letter and sprit of the law are constitutional. -- Those means which are convenient, useful, or essential is within Congress’s discretion
* The Constitution derives its authority from state conventions, which is from the people directly -- While the federal government is limited in its powers, within its domain it is supreme
* N&P clause can be used to justify nearly any means which has as its goal a constitutional end

(2)

* The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the Federal Government
* The power to tax is the power to destroy; that cannot coincide with the inherent power of preservation of the Federal government -- state authority to tax the federal government could threaten national security

## (I) Gibbons v. Ogden—1824—SCOTUS

**NY grants exclusive right to operate steamboat which conflicts with Federal license under statute passed under the commerce clause -- Does the commerce clause preempt NY’s exclusive license?**

* Where there is conflict, Federal laws preempt state law
* *Commerce describes the commercial intercourse between nations and parts of the nation* which cannot stop at the external boundary line of each state -- the power would be useless if it could not pass lines
* Within the commerce domain, congressional power is complete and may be exercised to the upmost extent subject to those limitations given in the constitution -- the political process is the only other limitation, not the courts -- action that effects the states generally, not one alone

## (I) United States v. E.C. Knight Co.—1896—SCOTUS

**Congress invokes the Sherman Antitrust act to prevent a manufacturing monopoly; allowed under commerce power?**

* Congress does not have the power to control the manufacture of a given thing -- the fact than an article is made for export to another state does not itself make the object one of “interstate commerce”
* ***Dissent (Harlan)*** -- Whatever improperly obstructs the free course of interstate intercourse and trade may be properly reached by Congress -- a monopoly that obstructs

## (I) The Shreveport Rate Case—1914—SCOTUS

**TX carriers were prohibited, by the ICC, from charging separate rates for out-of-state trains; under commerce power.**

* Congress may prevent instruments of dual commerce from being used in their intrastate capacities to the injury of interstate commerce
* Congress has the right to control all matters have such close and substantial relationship to interstate commerce that control is essential or appropriate to (1) the security of that traffic (2) the efficient of interstate service and (3) maintenance of fair conditions

*Dormant Commerce Clause Doctrine*

* Present here and developed by the courts to preclude any exercise of state autonomy when state laws inhibit or burden interstate commerce
* The modern era of this doctrine focuses on whether the State’s regulation seems to discriminate against non-local actors -- there is a presumption of upholding the law but it can be found discriminatory facially or in its effects or purpose

## (I) Champion v. Ames (The Lottery Case)—1903—SCOTUS

### Δ indicted for shipping foreign lottery tickets from TX to CA in violation of the 1895 Federal Lottery Act

* The commerce power is plenary, but not arbitrary given the limits place in the constitution -- if the act of Congress is within this limit but unwise or injurious, the remedy is the Political Process (Gibbons), not the courts
* The carrying of things, ordinarily subjects of traffic and which have a recognized value in money, from one state to another by independent carrier constitutes interstate commerce and may be regulated
* Congress may act on moral impulses as long as such is constrained to the domain of interstate commerce

## (1) Hammer v. Dagenhart (The Child Labor Case)—1918—SCOTUS

**[Essentially Overruled in *Darby*] Child Labor Act of 1916 prohibited interstate transportation of goods produced in factories employing children outside the guidelines of the act -- does such fall into the commerce clause?**

* The *mere fact that goods are intended for interstate commerce does not make their production “commerce”* & subject to federal control -- such would sanction Federal invasion into purely local matters not enumerated
* The act in effect does not regulate commerce but aims to standardize the ages at which children may be employed -- the commerce clause was not intended to equalize unfair business conditions

## (II) NLRB v. Jones & Laughlin Steel Corp—1937—SCOTUS

**Challenge to the National Labor Relations Act which established the right of employees to organize and was passed under the commerce clause -- prohibited “unfair labor practices” in commerce**

* Although intrastate in character, Congress may regulate any activity having such a close and substantial relationship to commerce that control is essential or appropriate to protect commerce from burdens
* The fact that employees are engaged in production is not dispositive, experience has shown that self-organization is an essential condition of industrial peace; the absence of which could effect commerce
* The Commerce power cannot extend to embrace effects upon interstate commerce so indirect & remote that to embrace them would effectually obliterate the distinction between what is national and local

## (II) United States v Darby—1941—SCOTUS

**[Overrules *Dagenhart*] Fair Labor Standards Act of 1938 proscribed min/max wages & hours for production of goods related to commerce -- Δ claimed the act was a pretext under *Dagenhart*.**

* *Motive is a matter of legislative judgment over which the courts are given no control -- Congress is free to exclude articles of commerce from the market although the state has not sought to regulate their use*
* The power to regulate shipment is separate from the power to regulate production -- regulating the shipment of goods is clearly within the domain of congress -- the purposes & motives are irrelevant -- Congress may regulate shipment of goofs it considers injurious to health, morals, and the general public welfare

## (II) Wickard v. Filburn—1942—SCOTUS

**Wheat production set under the Agricultural Adjustment Act is applied to personal farmer who over-produced but used his wheat for purely domestic purposes and not in [interstate] commerce**

* Activity may be reached if, in aggregation, it exerts a substantial effect on interstate commerce regardless if it is local in nature -- consumption of home grown wheat constitutes the most variable factor in the wheat shortage and thus private consumption effects interstate commerce
* Δ’s effects alone may be trivial, but that does not shield one from regulation where the effect could be far from trivial when taken with others similarly situated (aggregation principle)
* The relevance of economic effects in commerce analysis has made the mechanical application of legal formulas no longer possible -- moves away from the “direct v. indirect” inquiry of the commerce clause analysis

## (II) Heart of Atlanta Motel v United States—1964—SCOTUS

### 1964 Civil Rights Act prohibits discrimination in places of public accommodation whose operations affect interstate commerce -- defined what it meant to “affect” commerce

* As long as the means are *reasonably adapted to an end permitted by the constitution* -- power to promote commerce includes incidents local in nature which MIGHT have a substantial & harmful effect on commerce
* Congress is not restricted by the fact that a particular obstruction to commerce is also deemed a moral/social wrong; as long as there is evidence that it affects interstate commerce
* Whether right or not, Congress has a rational basis based on congressional hearings on the burdens that discrimination places upon interstate commerce of Negros; that reasoning is not subject to judicial inquiry

## (II) Katzenbach v. McClung—1964—SCOTUS

**Sister Challenge to the Public Accommodations Act as applied to “Ollie’s”, a bar-b-que restaurant in Alabama**

* The court need not consider the effect on commerce of one isolated local event without regard to the aggregation principle -- where legislators legislate in light of facts and testimony before them; the court’s investigation is over
* Although Δ only effects the demand side of commerce (46% of meat came from out of state), that does not prevent considering the cumulative effect of discrimination by restaurants generally on commerce
* “Affect” does not only mean to suppress or lessen; it includes to “change or redirect” commerce as well

## (III) United States v Lopez—1995—SCOTUS

**Gun Free School Zones Act of 1990 created a federal offense to possess a firearm in a school zone, passed under the commerce clause -- argued “substantial affect” should be read as “any affect”**

* Invalidated. The act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce -- to sustain the government’s contentions would transform the commerce clause to a general police power, the type retained by the states
* Establishes three categories of regulation under the commerce power
  + (1) Channels of interstate commerce
  + (2) Regulating or Protecting instrumentalities of commerce or people in commerce (although the threat may come from intrastate activities)
  + (3) Those activities having a substantial relation (effect) to interstate commerce [Thomas, J. continually dissents to argue this entire category should be eliminated]
* Substantial relation requires analysis of whether the regulated activity “substantially affects” commerce and cannot be sustained on the abstract level of a “cost of crime” on argument -- there is no jurisdictional element nor where there hearings/rational basis for finding the connection to commerce; although such is not dispositive
* ***Concurrence (Kennedy, J. -2)*** -- The court must not resort to an “economic/noneconomic” understanding of commerce clause jurisprudence; however, the government’s contentions would blur the lines of authority and lead to an inability to hold state or federal officials accountable -- each could blame the other
* ***Concurrence (Thomas*-1)** -- The aggregation principle is clever but has no stopping point -- eliminate (3)
* ***Dissent (Souter* -1)** -- Evokes the practice of deferring to rationally based legislative judgments as a paradigm of judicial restraint -- argues the majority is returning to the “direct/indirect” test
* ***Dissent (Breyer*-4)** --Courts must extend a degree of leeway in finding the existence of a rational basis -- since Congress COULD HAVE FOUND a rational basis, the court should defer
  + ***Breyer’s inability to find a limiting principle to the aggregating “cost of crime” theory is fatal***
* ***Note***: The court provided a broad definition of “economic” activity in Raich which includes “non-commercial” activity -- such does away with concerns of Kennedy, Souter, and Breyer

## (III) United States v Morrison—2000—SCOTUS

### Challenge to the civil remedy provisions of the 1994 Violence Against Women Act -- legislative history contained findings that gender-motivated crimes affect commerce -- passed under commerce power

* While there need not be a categorical rule, cases have upheld the regulation of INTRAstate activity only where that activity is economic in nature -- gender-motivated crimes of violence are not economic activity
* Congressional findings work on logic & reasoning already rejected by this court as unworkable in maintain the constitution’s separation of powers -- the concern in Lopez now seems well-founded
* With regard to purely intrastate activities, Congress does not seem able to regulate non-economic activity

## (III) Gonzales v. Raich—2005—SCOTUS

**Challenge to the Federal Ban on the cultivation/use of weed as applied to that grown at a person’s home and intended for consumption there only**

* Changes the court’s definition of “economic activity” to “the production, distribution, or consumption of a good or service” for which there is an international market
* Congress may regulate non-commercial intrastate activity (in the not produced for sale sense) if failure to regulate that class of activity would undercut regulation of the interstate market in that commodity
* There is a rational basis for concluding that high demand in the interstate market would draw atleast some of this intrastate marijuana into the market

## (IV) United States v. Comstock—2010—SCOTUS

**Challenge to federal statute authorizing civil comment of mentally ill sex offenders at the time of the release from federal prison -- law contained a procedure for transferring to state custody -- based in custody of federal prisoners**

* Court reaffirms the McCulloch view of the Necessary and Proper clause -- SCOTUS looks to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power -- i.e. *reasonably adapted to attainment of a legitimate end*
  + “Convenient, useful, or conducive” to the “beneficial exercise” of a enumerated power
* **Dissent (Scalia -2):** argues this is too far removed from an enumerated power (i.e. this is secondary to the power to established federal prisons; this law is appropriate to facilitate that implied power)

## (IV) NFIB v. Sebelius—2012—SCOTUS—[Commerce Question]

**ACA is justified under the commerce clause, as one part of a larger regulatory scheme -- CC and N&P issues**

* The reading of federal powers must be careful to avoid creating a general federal authority akin to the police power -- the commerce clause does not grant the power to compel one to become active in commerce

Concurrence (Roberts-1)

* The power to “regulate” presupposes the existence of something to be resulted -- that power does not include the ability to compel those not engaged in commerce to purchase an unwanted product
* Precedents (Raich) recognize authority to regulate classes of activities; but not classes of individuals apart from any activity to which they freely engage
* Congress already has the power to regulate much of what we do; allowing regulation of inactivity would transform the relationship between the government and its citizenry
* The Necessary & Proper clause *upholds authority derivative of (and in service to) enumerated powers* -- this does not include the ability to create the necessary predicate to the exercise of an enumerated power -- i.e. Congress may not compel participation in a market so that Congress has people to regulate; not proper even if necessary
  + “Convenient, useful, or conducive” to the “beneficial exercise” of a enumerated power

Dissent (Ginsburg-1)

* Argues Raich gives authority to enact laws in effectuation of its commerce power that would not be within authority if taken in isolation -- such must be an integral part of a complex regulatory scheme which itself is reasonably adapted to attainment of a legitimate end -- even if such is “non-economic” and local in nature

# Legislative Power: Taxing and Spending

## Overview

Article I, Section VIII, Clause 1 -- **Taxing and Spending Power** -- provides “power to lay and collect taxes, duties, impost and excises, to pay the Debts and provide for the common Defense and general welfare of the United States…”

* *Madison’s view*: Authority to tax & spend on behalf of the “general welfare” should be confined to the enumerated fields of legislative power
* *Hamilton’s view*: Authority to tax & spend confers a separate and distinct power and is not restricted by the grant of other powers -- Congress’s authority to tax & spend limited only by the requirement that it be exercised to provide for the general welfare
* *Limits to taxing power*: (1) Geographical uniformity (2) actually raise revenue (3) Not a penalty
* *Limits to spending power [Dole Factors]*
  + (1) Must be in pursuit of the general welfare (substantial deference granted)
  + (2) Conditions on State’s receipt of federal funds must be unambiguous (clear statement)
  + (3) [Cases suggest] Conditions on federal funds unrelated to the federal interest in the particular program or project may be illegitimate
  + (4) Cannot violate any other constitutional prohibitions

Determining whether Congress imposes a tax or a penalty *(Drexel Furniture Test)*

1. Does the exaction create an exceedingly heavy burden?
2. Does it contain a scienter requirement?
3. Is it enforced by an agency that would typically be responsible for publishing violation of the laws, not collecting revenue?

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## NFIB v. Sebelius—2012—SCOTUS—[Tax Question]

**ACA requires “Shared Responsibility Payment” for those who do not comply with the mandate**

* ACA may be “fairly characterized” as a tax that seeks to influence conduct, every tax is in some sense regulatory to the extent it imposes an economic impediment to the activity which is taxed *[Avoidance Canon Applied]*
* To be a tax, the penalty must (1) raise revenue (even a trivial amount) and (2) not impose a penalty
* There is no constitutional guarantee that one may avoid taxation though inactivity --although the breadth of the taxing authority is wide, its teeth are limited to requiring a payment and no more -- in that sense it does not exert the same degree of control over individual behavior as a regulation passed under the commerce clause
  + Commerce: Penalties/Commends are ok -- but limited to interstate commerce
  + Tax/Spend: Taxes ok & Penalties are not -- but activity as well as inactivity may be taxed
* ***[Drexel Furniture Analysis]*** (1) The penalty leaves a reasonably choice between purchasing insurance and paying the fee (2) the mandate simply establishes a condition that triggers a tax payment to the IRS and (3) its enforced through the IRS and paid with a person’s taxes, determined by taxable income & dependents and raises revenue
  + Passes under the narrowest interpretations of the taxing authority

## United States v Doremus—1919—SCOTUS

**Statute taxes the sell of opium products in order to discourage their sale**

* The only limitation upon the taxation power is geographical uniformity -- subject to this consideration Congress may select the subjects of taxation at its discretion
* That ulterior motives may underlie a tax does not authorize the courts to inquire into that subject

## United States v Butler—1936—SCOTUS

**Challenge to an tax/spend program designed to stabilize agriculture production; taxes from one crop used to subsidize farmers of another crop who agreed to reduce their production**

* Accepts Hamilton’ view of the tax & spend powers -- but holds the tax/spend plan unconstitutional
* There is an obvious difference between a law stating conditions on which money shall be granted and one effective only upon assumption of contractual obligations of a regulatory plan not otherwise enforceable
* If the power to tax/spend can be used to enforce regulation of areas of traditional state concern, it would tend to nullify constitutional limits on federal power -- Congress could buy compliance it is powerless to command
* “The threat of loss, and not the prospect of gain, is the essence of economic coercion
  + ∆ fails *United Coin* test

## Steward Machine Co. v Davis—1937—SCOTUS

**90% federal unemployment insurance tax rebate given to employers who contribute to state unemployment fund meeting federal minimum requirements**

* Like a tax, every rebate is in some sense regulatory when it is conditioned upon certain conduct -- it may be considered temptation, but to hold such equal to coercion would plunge the law into endless difficulties
* Congress may condition a rebate on a separate activity which serves the same fiscal need -- such is not a tax where the conduct regulated is unrelated to the fiscal need served by the tax (or any legitimately national end)

## NFIB v Sebelius—2012—SCOTUS—[Spending Question]

**Challenge to the conditioning of current Medicare funds to the ACA expansion as coercive**

* Instead of withholding new funds for those who don’t accept the expansion, the government imposed new conditions on existing funds -- Conditions on federal funds must be accepted voluntarily and knowingly
* When conditions take the form of threats to terminate other independent /unrelated grants; such is properly viewed as a means of coercion -- principles of federalism and fair notice would otherwise be violated
* Congress may create incentives through a tax/abatement program that channels money to states that would have gone into the federal treasury for the exact same purpose (UI insurance) -- this program is not a related expansion but one element of a universal health coverage plan

## South Dakota v Dole—1987—SCOTUS

**Congress withholds federal highway funds from states would did not raise the drinking age**

* While at some point pressure turns into coercion, threatening to withhold 5% of the capable funds is considered “relatively mild encouragement” to the states to enact the sought after laws
* Objectives not thought to be within Article I’s legislative grants may be attainted through the use of the spending power and conditional grant of federal funds provided
  1. The exercise of spending power must be in pursuit of the general welfare (substantial deference)
  2. Conditions related to receipt of federal funds must be stated unambiguously (full knowledge)
  3. Conditioned funds must be related to the federal interest in particular national projects/programs
  4. Not otherwise constitutionally prohibited

# Legislative Power: Treaties & External Limits

## Overview

U.S. Const. Amendment X -- **Reservation Clause** -- “Those powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the State’s respectively, or to the people”

* The reservation clause expresses the principle of Federalism -- one of the external limits on legislative power

Article II, Section II, Clause 2 -- **The Treaty Power** -- [The President] shall have the power, by and with the advice of the senate, to make treaties, provided two thirds of the Senators present concur

* The treaty power reserves a legislative role in the process of making treaty and is apart of the greater federalism theme of the Constitution

The Tenth Amendment as a Federalism Based Limitation on legislative power

* ***Clear Statement Rule*** (Statutory Interpretation)
  + When Congress seeks to alter the traditional balance of power between the states & the federal government, a clear statement is required -- otherwise it will be interpreted
    - Same trigger as NLC, but used in interpretation and not invalidation -- “traditional balance of state power”
    - (1) Can be an information forcing tool and (2) makes it harder to pass the law because the express language will likely encounter resistance -- makes the structure protection more real
* ***Anti-Commandeering Principle*** 
  + This 10th amendment limitation prevents Congress/President from directly compelling States to adopt and enforce federal regulatory schemes
  + Note: It is not the imposing of regulation on the states, but conscripting state actors as a means to enforce the regulatory scheme that violates the anti-commandeering principle
    - Congress may impose obligations on state actors that effect “how” they do their job -- it may not commandeer those state officials to enforce federal law (or add new substantive duties)
* ***Structural / Substantive Protections***
  + Although NLC defined substantive limits of federalism, the court abandoned all structural limits in Garcia; however, the minority in Garcia all seemed nervous without some limit -- therefore one was placed in the form of statutory interpretation in *Gregory v Ashcroft*
  + If faced with the right fact pattern, you may be able to make an argument for a substantive arm of federalism -- based in the same limiting principles found in the modern substantive due process arm

## Missouri v Holland—1920—SCOTUS

**Challenge to legislation passed to implement the Migratory Bird Treaty signed with Great Britain -- a similar act had been invalidated before the treaty -- question whether treaties may authorize regulation of areas not enumerated?**

* *Whether the prior cases was decided correctly or not cannot be accepted as the test of Federal treaty power*
* The treaty in question does not contravene any constitution prohibitions -- there is a national interest of the first magnitude involved that can only be protected by concerted national action with that of another country
* *Takeaway*: there is potential for Congress to pass legislation based on a Treaty which could not be sustained under its enumerated powers

## Medellin v Texas—2008—SCOTUS

**Mexican National seeks to use ICJ ruling to force reconsideration of his conviction pursuant to his rights under the Vienna Convention on Consular Relations -- no “self-executing” language**

* Because this treaty is not self-executing, it does not automatically constitute federal law that is enforceable in US courts -- there must otherwise be specific legislation proscribing the treaty into federal law
* While treaties may comprise international commitments, they are not domestic law unless Congress has enacted implementing statutes or the treaty contains/ is ratified under a clear intention that it be self-executing

## National League of Cities v Usery—1976—SCOTUS

**[Overruled by *Garcia*] Congress seeks to apply the minimum wage provisions w/ regard to state employees**

* *The commerce clause does not permit enforcement against the state in areas of traditional state functions*
* Although the wage and hours of employees effect interstate commerce, application of the statute to state/local employees is unconstitutional due to 10th amendment federalism limitations
* Core/traditional state functions are substantially protected from federal regulation per the 10th amendment

## Garcia v San Antonio Metropolitan Transit Authority—1985—SCOTUS

**Dealt with application of the same provisions to transit workers; what are the contours of “NLC”**

* The NLC framework is rejected as unworkable in practice and unsound in principle -- any rule of state immunity that turns on judicial appraisal of the merits of a particular state function invited inconsistent results and disserves the principles of democratic self-governance
* Federalism limits on Congresses’ power are structural and not substantive -- states must find their protection through the national political process and not judicially defined spheres of unregulatable state activity
* *Takeaway*: Substantive federalism questions could raise “political question” problems -- “unworkable/unsound”

**Dissent**

* **Powell (4) --** The framers recognized that the most effective democracy occurs at local levels -- the rise of lobbyist/money in campaigns and drafting by committee staff are thought to have significant influence in a manner unlikely to safeguard the sovereign rights of the states and localities unlike the majority suggest
* **O’Connor (1)** [Concurring in Judgment only] -- There is more to federalism than the realm of authority left open to the States by the Constitution -- with the abandonment of NLC, all that stands between state sovereignty and Congress is the latter’s underdeveloped capacity for self-restraint

## Gregory v Ashcroft—1991—SCOTUS

**Challenge to application of the ADEA to mandatory retirement provisions affecting appointed state judges**

* The statute exempts appointees on a policymaking level, which may be read to include judges -- a state’s retirement provision is a decision of the most fundamental sort for a sovereign entity
  + The authority to determine the qualifications of its state officials
* *If Congress intends to alter the usual balance of federalism, it must make its intention unmistakably clear in the statutory language* -- otherwise it will be interpreted as not to impinge on state sovereignty
  + (1) Potential constitutional conflict (2) textual ambiguity (3) rational basis for reading

## New York v United States—1992—SCOTUS

**Challenge to the “take title” provisions of federal statute requiring states to take ownership of private nuclear waste if they did not build a nuclear waste facility within their state**

* Congress may not simply commander the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program -- Congress crossed the line between encouragement and coercion
* Commandeering state legislative process destroys accountability -- the goal is to protect individuals and their rights, not the states -- State officials would be blamed for the cost; fed officials would escape liability
  + *Note*: Under the Supremacy clause, state judges are automatically commandeered -- generally because the Constitution did not establish any inferior Federal Courts; therefore state judges were needed to enforce federal law -- not true with executive and legislative officials
* Congress may encourage states to enact regulatory programs through incentives which influence a state’s policy choices -- Exercises of the spending power must pass Dole or (2) incur the cost associated with the provision
* *Takeaway*: Seems you need to leave the State with the reasonably opportunity to say no (NFIB)

## Printz v United States—1997—SCOTUS

**The Brady Act required DOJ to establish a national instant background check -- in the interim gun dealers were required to send a form identifying any purchaser to the local CLEO (Sherriff) who was required to give “reasonable effort to ascertain whether receipt or possession would be in violation of the law”**

* The federal government may neither issue directives requiring the states to implement federal regulatory schemes nor command the states executive officers to administer or enforce a federal regulatory program
  + The same rationale present in New York apply to state executive officials as well
* The power of the Federal government would be augmented immeasurably if it were able to impress the police officers of all 50 states into its service at no cost to itself -- the principles of dual sovereignty are violated by this law, that fundamental defect cannot be overcame by comparative assessment of various interest
  + Rejected a “minimal & temporary burden” argument from the Federal Government
* Court also held the Brady Act was not a proper method of implementing an enumerated power under the “Take Care Provision” requiring the president “faithfully execute” the laws -- there was no meaningful presidential control of the responsibility that would be transferred to thousands of CLEOs
* Historical practice also bodes against the government -- never before has Congress attempted to impress into its service state executive officials to enforce a regulatory scheme

# The Executive Power

## Overview

**Youngstown Framework for Analysis of Presidential Power**

* *Youngstown One*
  + When acting with the express or implied authorization of Congress, presidential authority is at its max for it includes all the power that he possesses in his own right and all that Congress can delegate
  + Receives the strongest of presumptions and the widest of latitudes
* *Youngstown Two (Zone of Twilight)*
  + When the presidents in the absence of congressional grant or denial of authority, he may rely only on his independent powers for there is a zone of twilight in which he and Congress may have concurrent authority or which distribution is uncertain
  + Any test must depend on the imperatives of the events
  + Historical Gloss -- A systematic, unbroken executive practice long pursued to the knowledge and acquiescence of Congress
* *Youngstown Three*
  + When acting against the express or implied will of Congress, presidential authority is at its lowest because he must rely only on his constitutional powers -- courts may sustain action only by disabling Congress from acting in the domain i.e. a preclusive/exclusive power
* *Note*
  + No Emergency Powers are granted aside from suspension of the writ

**The Allocation of War-Making Authority**

* The Constitution is notoriously ambiguous on the allocation of warmaking power -- Congress is expressly empowered to “Declare War”, which was originally to “Make War” -- “declare” was thought to signify a narrower power which gave the president power to repel sudden attacks

**War Powers Act of 1973**

* WPA requires the President to submit a report to Congress within 48 hours of the introduction of American troops, in absence of a declaration of war
  + (1) ***Into hostilities*** or into situations where imminent involvement in hostilities is clearly indicated by the circumstances
  + (2) Into foreign territories equipped for combat except for deployments which relate solely to supply, replacement, repair, or training of such forces or
  + (3) In numbers which substantially enlarge US forces equipped for combat already in the country
* Submission of a report triggers a 60-day period, at the end of which the President must terminate the mission unless Congress (1) gives authorization (2) extends the time period or (3) cannot meet due to attack on US soil
  + Can be extended by 30 days upon notification that a “unavoidable necessity respecting safety of troops requires continued use or forces in the course of bringing a prompt removal
* Without authorization, forces shall be removed if Congress directs by concurrent resolution
  + Note: The president is not given a veto on this resolution -- does this present a Constitutional issue?

## Youngstown Sheet & Tube Co. v Sawyer—1952—SCOTUS

**Truman seizes the nations steel mills to prevent work stoppage during the Korean War;**

* The Executive Order does not direct a congressional policy be executed but a presidential policy -- use of seizures to solve labor disputes is not only unauthorized by Congress but explicitly rejected in the Taft-Hartley Amendment which would have authorized such seizure
* The executive order cannot be sustained as an exercise of the Commander in chief power -- the theatre of war does not extend within the internal boundaries of the US

***Concurrence***

* Frankfurter (1) -- A systematic, unbroken, executive practice long pursued to the knowledge and acquiesce of Congress may be treated as a gloss on executive power; it suffices 3 isolated instances do not meet this burden
* Jackson (1) -- First articulates the Youngstown framework, as noted in overview
  + “The appeal that we declare the existence of inherent powers as necessary to meet an emergency is a power that either has no beginning or no end -- it is the duty of the court to be the last, not the first, to give up such a power”
  + History shows us that emergency powers are consistent with free government only when their control is lodged elsewhere than the one who exercises them

## United States v Curtiss-Wright Corp.—1936—SCOTUS

**Challenge to Congressional resolution allowing the President to prohibit any sale of arms if he found such a prohibition would contribute to peace in the region -- Δ indicted for selling machine guns to Bolivia**

* The Broad statement that government can exercise no powers except those specifically enumerated is true only with respect to internal affairs -- the president alone may speak or listen as the representative of the nation
* Rules come and go, governments end and change, but sovereignty survives; except where specifically given a role, the realm of external power is vested in the executive

## Medellin v Texas—2008—SCOTUS

**Mexican National seeks to use ICJ ruling to force reconsideration of his conviction pursuant to his rights under the Vienna Convention on Consular Relations -- President issued executive order requiring state courts to follow ICJ**

* While the President has an array of political and diplomatic means available to enforce international obligations, unilaterally converting a non-self-executing treaty into a self-executing one is not one of them
* The responsibility of converting the treaty is a legislative one and it falls on Congress alone -- congressional acquiescence is relevant only in Y2, here the president is acting contrary to constitutional ratification authority

## Dames & Moore v. Reagan—1981 —SCOTUS

**Reagan’s agreement to end the Iranian Hostage Crisis required nullification of all legal proceedings and transfer of all claims to the tribunal/binding arbitration**

* Legislation closely related to the question of particular authority which evinces intent to accord broad discretion may be considered implicit congressional approval; congress can not anticipate and legislate with regard to every possible action the president may find necessary -- such failure does not imply congressional disapproval
* Because the action was taken pursuant to specific congressional authorization, a contrary ruling would mean the federal government as a whole lacked the power exercised -- the court is not prepared to say that
* The Youngstown Framework are not rigidly bound categories but a spectrum of authority -- in moving across the spectrum one must consider (1) how to read congressional action/inaction and (2) the historical gloss

## Presidential Powers: Harold Koh Testimony before the Senate Foreign Relations Committee

**Defines Hostilities under the War Powers Act and defends US intervention in Libya**

* The executive branch understand “hostilities” to mean “a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces”
* A combination of four factors present in Libya suggest that the current situation does not constitute the kind of “hostilities” envisioned by the War Powers Resolution 60 day pullout rule
  + *The mission is limited* -- US forces are playing a constrained and supporting role
  + *The exposure is limited* -- operations do not involve active exchange of fire with hostile forces or a threat of significant U.S. causalities
  + *Risk of escalation is limited* -- potential for escalation into broader conflict is characterized by (1) a large ground presence (2) major casualties (3) sustained active combat or (4) expanding geographical scope
  + *Military means are limited* -- Libya does not present “full military engagement”; the bulk of contributions have been providing intelligence capabilities and refueling assets
* Under longstanding OLC opinion, there is a two prong test for unilateral use of force
  + (1) Do operations implicate important national interest?
  + (2) Are the operations sufficiently extensive in “nature, scope, and duration” to constitute a “war” requiring prior congressional approval under the “Declaration of War” clause

## Hamdi v Rumsfeld—2004—SCOTUS

**Habeas Corpus petition brought to challenge executive detention of a US citizen captured in Iraq and declared an “enemy combatant” within the meaning of the Authorization for the Use of Military Force (AUMF)**

* *[Plurality]* If the record establishes US troops are engaged in active combat, then detentions are part of the exercise of “necessary and appropriate force” allowed by the AUMF (Y1) -- preventing enemies from returning to the field of battle and taking up arms overrides the objection to a prospect of prolonged detention
  + Uses Avoidance canon to avoid Y2/Y3 questions in times of heightened national security concerns
* Regardless, a citizen-detainee seeking to challenge his classification must receive notice of the factual basis for his classification and fair opportunity to rebut that evidence before a neutral -- aside from these core elements, proceedings may be tailored to alleviate their uncommon potential to burden the executive during conflict
  + Core elements considered procedural due process
* ***Concur/Dissent (Souter-2)*** -- Concurs as far as the plurality rejects the process afforded as satisfying habeas corpus as the appellate court determined -- dissents as far as the plurality accepts the position that if Hamdi’s detention is correct, then his detention is authorized at least for some period of time
  + Believes the procedure is essentially a suspended writ which requires a clear statement
* Dissent (Scalia-2) Would hold there has been no suspension of the writ -- “Many think it inevitable and property that liberty give way to security in times of national crisis, whatever the merits of that view, it has no place in the interpretation and application of a Constitution designed precisely to confront war
* Dissent (Thomas-1) -- Would have upheld the classification as an exercise of executive war powers and outside the expertise of the court -- Congress may provide for additional procedure but SCOTUS should not insist

## Boumediene v Bush—2008—SCOTUS

**Challenge to the Detainee Treatment Act and the Military Commissions Act -- passed in response to *Hamdan v Rumsfeld* where SCOTUS invalidated the military tribunals for terrorist as contrary to Congressional authorization**

* The DTA unconstitutionally restricts the Writ of Habeas Corpus -- the writ may not be watered down -- it must be suspended or adhered to -- it is not suspended absent a clear statement from Congress suspending it
* Constitutional Habeas Corpus protections run to the US Military base at Guantanamo Bay -- although Cuba maintains de jure control, the area is under the de facto authority of the United States
* Habeas is one of the few liberty safeguards specified in the Constitution; it protects all who litigate in US courts at least as far as the protection extended during the founding --- 3 part test
  + 1) Citizenship and status of the detainee and the process used to determine that status
  + 2) Nature/location of the sites where apprehension and detention took place
  + 3) Practical obstacles inherent in resolving the prisoner’s entitlement to writ
* Note: In the wake of Boumediene, the D.C. Cir has repeatedly reversed district court decisions granting detainees from other facilities habeas corpus -- Precedents have held that (1) government reports are entitled to the presumption of accuracy (2) could be based upon hearsay and (3) at most a preponderance of the evidence standard is required. [ All have been denied cert.]

## National Labor Relations Board v Noel Canning—2014—SCOTUS

**Challenge to NLRB enforcement action arguing the board lacked quorum to act because three of its members had been appointed illegally; appointed during 3-day intra-session recess; first challenge to the recess appointment clause**

* *The recess power permits the executive to function when Congress is unavailable; the lack of historical precedent triggering this power in periods less than 10 days suggest the power is not needed in that context*
* The recess power is allowed when the senate, under its own rules, does not have the capacity to transact Senate business -- The senate is otherwise in session when it says so; Senate actions must be taken at face value

# Individual Rights: Due Process

## Overview (Protects Right to Certain Conduct)

**Due Process** -- 5th and 14th amendments -- No state can deprive any person of life, liberty, or property without due process of law

* Procedural Due Process
  + Notice, opportunity to be heard [See: Hamdi]
* Substantive Due Process
  + Lochner Era -- The Lochner era was an attempt to create a separate category of impermissible government ends using the libertarian framework of the common law as a theoretical basis under which the police power was sharply limited as a raw exercise of political power by beneficiaries

**Fundamental Rights** -- Although constitutionally drawn, the line between express and implied rights is not a clear one -- the right to free speech is a clear one but the right to spend large sums of money on campaigns is implied

* *Enumerated Fundamental Rights*
  + The Constitution specifically enumerates a number of individual liberties -- of which have penumbras protecting other activities which fall into implied fundamental rights
* *Implied Fundamental Rights*
  + ***One of the central issues is the appropriate level of abstraction that will define the content of the liberty sought to be protected*** -- the more narrow the tradition, most likely the harder it is to defend (Bowers / Michael H) -- the broader the tradition, the more that will be encompassed in its penumbra (Lawrence)
    - The right to contract was an implied fundamental right -- ended with the Lochner era
    - The right to privacy (free from government intrusion) is currently the court’s most used IFR
    - How do you define these rights?
      * “Inherent in the concept of Ordered Liberty”
      * As far as the test goes -- IF TMo wants you to use history to define a new fundamental right, he will probably provide the history in the test
      * Is the right (1) Civil (2) Political or (3) Social?

(I) The Rise and Fall of *Lochner*

(II) Procreative Autonomy / Family & Other “Privacy Interest

(III) Abortion

(IV) Intimate and Cultural Associations / Same-Sex Marriage [Move SSM to EPC behind Romer]

## (I) Lochner v New York—1905—SCOTUS

**Challenge to NY statute limiting the work-week for the baking industry as unreasonable interference with the general right to contract, contained within the “liberty” concern of the Due Process Clause**

* States have a plenary police power relating to the safety, morals, and general welfare of the public -- when viewed in light of a purely labor law, the statute does not implicate any of these interest
* Statutes must have a more direct relation to one of these ends before an act interfering with the general right to be free in person/contract is valid -- Statute must be a means to and end, and the end itself appropriate
* Baking is not and of itself an unhealthy trade to the degree that would authorize the legislature to interfere with the right of labor to freely contract -- the remote relation to public health does not render the statute valid

Dissent

* Harlan (3) -- Statute must be taken as expressing a legislative belief that labor past 60 hours may endanger the health of those employed -- it is impossible to say there is no real substantial relationship between means/end
* Holmes (1) -- This case is decided upon an economic theory which a large part of the country does not entertain -- general propositions should not decide concrete cases

## (I) Nebbia v New York—1934—SCOTUS

**NY established the Milk Control board with price fixing authority to help instability after legislative findings that milk was an essential item of diet and failure to receive reasonable returns could relax vigilance against contamination**

* A state is free to adopt whatever economic policy reasonably deemed to promote the public welfare and enforce that policy by legislation adapted to its purpose -- courts are without authority to override that decision
* The DPC mere conditions the exercise of the police power on means consistent with due process, meaning the law shall not be unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the object sought to be attained
* There is no closed category of businesses affected with a public interest -- the court must determine whether the circumstances vindicate the challenged regulation as reasonable or condemn it as arbitrary or discriminatory

## (I) West Coast Hotel Co. v Parrish—1985—SCOTUS

**Challenge to state law establishing minimum wage for women; state argued the health of women was a public interest and their situation in the labor market entitled them to protection**

* The Constitution does not speak of freedom of contract, it speaks of liberty and prohibits deprivation thereof without due process of law -- *regulation reasonably related to its subject and adopted in the interest of the community comports with the DPC*
* Exploitation of a class who have unequal bargaining power and are relatively defenseless against the denial of a living wage is not only detrimental to their health but cast a direct burden for their support on the community -- the community is not bound to provide a subsidy for unconscionable employers

## (I) United States v Carolene Products—1985—SCOTUS

**Challenge to prohibition on “filled milk” -- argued replacement of regular milk would result in undernourishment of the public despite the branding/labeling requirements of the FDA -- challenged on right to enter contract**

* Where the rational basis of a statute depends on facts beyond the sphere of judicial expertise or notice, the constitutionality of such a statute may be challenged by showing those facts have ceased to exist -- otherwise legislative authority will not be called into question because it thought unwise
* Legislation affecting ordinary commercial transactions is constitutional unless the facts made known or generally assumed are of such a character as to preclude the assumption that the statute rest upon rational basis
* Established a “presumption of constitutionality” -- the burden is on the challenger when the constitutionality of a statute predicated upon the existence of a particular state of facts outside of judicial expertise
* ***Note: Footnote 4* -- Deference will not apply to laws that (1) run up against a specific prohibition of the Bill of Rights (2) Restrict the political process or (3) prejudice discrete and insular minorities**

## (II) Meyer v Nebraska—1923—SCOTUS

**Statute prohibits foreign languages from being taught in any public or private grammar school**

* Certain fundamental rights may not be interfered with by the state -- no emergency has arisen which renders the knowledge of some language other than English so clearly harmful as to justify this infringement
* Infringement on rights long freely enjoyed mare were also included within the substantive due process arm when lacking reasonable relation to some purpose within the competency of the state to effect

## (II) Pierce v Society of Sisters—1925—SCOTUS

**Statute requires attendance at public schools instead of private schools**

* This statute is an unreasonable interference with the liberty of parents to direct the upbringing and education of children under control -- there is no rational basis for proscribing attendance at private schools
* There is no rational relation to any purpose within the competency of the state to effect i.e. arbitrary

## (II) Skinner v. Oklahoma—1942—SCOTUS

**Oklahoma “Habitual Criminal Sterilization Act” allowed for court ordered sterilization of persons who were convicted to three or more felonies involving moral turpitude, but exempted white collar crimes/political offenses**

* Any experiment the state conducts does irreparable injury -- the power to sterilize could have devastating effects and in reckless hands it can cause races to wither and disappear -- [Doesn’t articulate the specific right because it is decided on EPC grounds]
* The statute allows for crimes of the same nature punishable in the same manner to be treated differently -- one may be sterilized for repetition regardless of size/frequency and one can not -- when the law lays an unequal hand on those who committed intrinsically the same offense; it violates the DPC/EPC of the 14th amendment

## (II) Griswold v Connecticut—1965—SCOTUS

**Doctor fined for giving medical advice as a means of preventing conception -- statute prohibited any person from using “any drug, medicinal article, or instrument for the purpose of preventing conception” -- Conn. Justified as an exercise of police power to provide moral structure**

* *Specific guarantees in the Bill of rights have penumbras formed by emanations which help give them life* -- various guarantees create zones of privacy -- one of them is the right to privacy in the marital bedroom
* Finds an “inter-textual” right to privacy based on reading multiple provisions together -- rights which individually protect parts of a larger right/idea (1st, 3rd, 4th, 5th, & 9th Amendments) -- **[Not as Substantive Due Process]**
* In forbidding the use rather than regulating the manufacture or sale, the state seeks to achieve its goals by invading the privacy of marriage -- regulation cannot be achieved by means which sweep unnecessarily broadly

***Concurrence (Harlan -- Basis of Modern Substantive Due Process)***

* Unlike the Lochner Era, judicial self restraint in substantive due process will be achieved by continual insistence upon respect for the teaching of history, recognition of the basic values that underlie our society, and wise appreciation for the great roles that federalism and separation of powers have played in establishing and preserving American freedoms
* Moral goals cannot be enforce by means which drastically invade protected freedoms such as the home
* The balance needed is struck between “what history shows are the traditions from which this country developed and the traditions from which this country broke

## (II) Eisenstadt v Barid—1972—SCOTUS

**Challenge to law allowing married women to obtain contraception from doctors but denying such to single women -- π was caught distribution contraception to married and unmarried persons on BU’s campus**

* The statutory distinction between married & single women does not rationally further any state interest -- whether it be preservation of health or prevention of premarital sex
* If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision to bear a child

## (II) Moore v City of East Cleveland—1977—SCOTUS

**Challenge to city ordinance limiting occupancy of any dwelling to narrowly defined “family” unit -- π grandmother was unable to live with her grandson because he was not “sufficiently related” to his uncle**

* The Constitution protects the sanctity of the family precisely because the institution is deeply rooted in this Nation’s history and tradition; it is through the family that we pass our most cherished moral/cultural values
* When a city undertakes such intrusive regulation of the family, judicial deference to the legislature is inappropriate; although the city has legitimate goals, the ordinance serves them marginally at best
* Restates Harlan: “appropriate limits on substantive due process come from careful respect for the teaching of history and solid recognition of the basic values that underlie our society

## (II) Zablochi v Redhail—1978—SCOTUS

**Wisconsin statute requires anyone with a support order for a child not in their custody to obtain judicial approval prior to being marries showing that the children “are not then nor likely thereafter to become public charges”**

* [EPC] IT would make little sense to recognize a right of privacy with respect to family matters and not the decision to enter marriage -- the statute “directly and substantially” effects the right to marry for many
* When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless supported by sufficiently important state interest & closely tailored to effectuate those interest
* Doctor/Patient privilege is waved when π put her mental/physical state at issue by requesting damages for mental distress -- such information is discoverable when it becomes materially relevant to the litigation

Concurrence

* Stewart (1) -- To violate under the EPC misconceives the meaning, it does no further than invidious discrimination- -- the problem is not one of discriminatory effect but unwarranted encroachment upon constitutionally protected freedom -- the law should be unlawful as applied to indigents

## (II) Michael H v. Gerald—1989—SCOTUS

**Man fathers child with married woman, under CA law the child is presumed to be of the marriage -- biological statute challenges the statute as applied [Scalia v Brennan on the appropriate level of abstraction]**

* “Liberty” interest within the DPC must be fundamental and also traditionally protected by our society
* Traditions must be discerned at the most specific level at which a relevant tradition on the right can be identified -- a rule of law that binds neither by text nor specific identifiable tradition is no rule of law at all
  + Note: This was contained in Footnote 6, joined only by Rehnquist -- so you can argue this point
* Because general traditions provide such imprecise guidance, they permit judges to dictate rather than discern society’s views -- if there is no identifiable tradition than you move up a level and consider it here

***Dissent (Brennan)***

* The problem with moving between levels of generality is that you can frame the levels in ways that decide the answer before any inquiry is made -- basing rights solely on majoritarian analysis of tradition leads in essence to a constitutional “popularity contest” -- tradition is not an objective boundary
* Sees the level of abstraction as requiring inquiry more generally into whether parenthood is an interest that has historically received the Court’s attention and protection

*\*\*\*Framing the Issue can be Dispositive \*\*\**

## (III) Roe v Wade—1973—SCOTUS

**Challenge to TX law making an abortion a crime except for by medical advice to save the mother’s life**

* The Constitution has recognized a protection for certain zones of privacy deemed fundamental or “implicit in the concept of liberty” including activities related to marriage -- that is sufficiently broad to encompass a woman’s abortion decision under consultation with her doctor [Abortion = Fundamental Right / Strict Scrutiny]
* The recognition of a zone of privacy also acknowledges that some state regulation is appropriate, but only under strict scrutiny -- but TX cannot, by adopting “life at conception”, override the rights of pregnant women
* Establishes the trimester system for abortions

Concur/Dissent

* ***Douglass (C-1)*** -- Would violate under the 9th amendment -- such does not create federally enforceable rights but a catalogue of rights retained by the people considered the “blessings of liberty” -- includes customary, traditional, and time-honored rights, amenities, privileges, and immunities
* ***White (D-2)*** -- While the court perhaps has the power to do what it does today, this is an improvident and extravagant exercise of the power of judicial review -- the upshot is the people and legislatures of the 50 states are constitutionally disentitled to weigh the relative importance of the fetus
* ***Rehnquist (D-1)*** -- Would have found no right of privacy involved in the case -- merely a claim of one to be free from unwanted state regulation of consensual economic transactions -- such deserves the rational basis test typically applied in the area of social and economic legislation

## (III) Maher v Roe—1977—SCOTUS

**Challenge to state regulation granting Medicaid benefits for childbirth but denying such benefits for abortions not medically necessary -- π argues the state cannot express a policy preference by funding only one procedure**

* Row did not declare un unqualified constitutional right to abortion but rather protects women from unduly burdensome interference with her freedom to decide -- there is no implicit limitation on the authority to implement value judgments by the allocation of public funds
* There is a fundamental difference between interference with a protected activity and state encouragement of another activity -- Constitutional concerns are the greatest when the state attempts to impost its views with the force of law; the power to encourage is necessarily far broader
* Since the case makes no impermissible classification, the only question is whether the regulation impinges upon a fundamental right -- The state places no obstacles, absolute or otherwise, in the path to an abortion -- it may have made childcare a more attractive alternative, but it imposed no restriction not already there

***Dissent***

* ***Brennan (3)*** -- The majority shows a distressing insensitivity to the plight of the impoverished pregnant women; the disparity in funding operates to coerce women to bear children they would not otherwise
* The burden is upon the right to privacy and not religion, but the governing principle should be the same

## (III) Harris v MaRae—1923—SCOTUS

**Challenge to the “Hyde Amendment” which prohibits federal Medicaid funds from preforming abortions except as necessary for the life of the mother or for victims of rape of incest**

* It simply does not follow that freedom of choice carries a constitutional entitlement to the financial resources to avail oneself of the full range of protected choices -- although the government may not place obstacles in the path of an abortion, it need not remove those not of its own creation
* Regardless of the reading of Roe, it simply cannot be that government has an affirmative constitutional obligation to ensure all persons have the resources to obtain an abortion

## (III) Planned Parenthood v Casey—1992—SCOTUS

**Challenge to certain provisions of the “Pennsylvania Abortion Control Act” -- (1) 24 hour informed consent provision (2) married women / husband notification provision (3) minor informed consent w/ bypass option (4) reporting requirements on all abortion facilities -- made exception for medical emergencies**

* \*\*Roe’s “essential holding” is affirmed -- (1) a recognition of the right to choose before viability without undue interference from the state and (2) state power to restrict abortion after viability (exceptions provided) and (3) State’s legitimate interest in protecting women’s health/life of the fetus from the onset of the pregnancy \*\*\*
  + Note: These interest are shifted a bit from *Roe*
* Neither the Bill of Rights r state practices at the time of adoption mark the outer limits of the substantive sphere of liberty protected by the DPC -- Motherhood involves sacrifices & suffering the woman alone must bear; such is too intimate & personal for the state to insist on its vision however dominant it is through history/culture
* During two decades of economic/social development, people have organized their intimate relationship and choices in reliance on *Roe* -- while reliance cannot be exactly measured, neither can the cost of overruling Roe
* While time has overtaken some of Roe’s factual assumptions -- the some of this inquiry shows Roe’s legal underpinnings unweakened in any way affecting its central holding
* Trimester framework is rejected as not part of the essential holding of roe -- it misconceives the nature of the woman’s interest and in practice undervalues the state’s interest in potential life -- Roe did not guarantee a fundamental right to abortion on demand, but rather a right to decide free of undue interference by the state
* *Prohibits “undue burdens” on the exercise of the right to abortion -- shorthand for those regulations that have the purpose or effect of placing a substantial obstacle in the path to abortion -- laws must be calculated to inform a woman’s free choice and not hinder it*
* All provisions upheld except for the notification requirement for married women
* ***Majorities State Decisis Inquiry***: (1) Unworkability (2) Reliance (3) Change in Law / underlying doctrine (4) Change in fact / cultural understanding of facts (5) appearance of capitulation to political whims by overruling

Concurrence/ Dissent

* ***Blackmun (C/D -1)*** -- PA law rest upon the assumption that women can simply be forced to accept the “natural” status/ incidents of motherhood -- a conception of the woman’s role that is “no longer consistent with out understanding of the family, individual, or the Constitution. -- Would violate under EPC
* ***Stevens (C/D-1)*** -- Stevens would override all of the challenged provisions -- also *would allow a burden to be “undue” under the majority formulation or because it lacks rational justificatio*n -- legitimate interest must be (1) secular and (2) not promote a theological/sectarian interest consistent with the first amendment
* ***Rehnquist (D*-4)** -- Historical traditions of the American people do not support the view that the right to terminate one’s pregnancy is “fundamental” -- the joint opinion retains the outer shell of Roe but beats a wholesale retreat from the substantive of the case -- Roe was wrongly decided and should be overruled
* ***Scalia (D*-4)** -- Not only did Roe not resolve the deeply divisive issue of abortion, it elevated it to the national level where it is infinitely more difficult to resolve -- profound disagreement is better solved at the state level where the division of sentiment is not as closely balanced, leaving more satisfied on the whole

## (III) Stenberg v Carhart—2000—SCOTUS

**Challenge to Nebraska statute banning “partial birth abortions”**

* The statute (1) contains no exception for the preservation of the health of the mother a required by Casey
* The statute also (2) imposes an undue burden -- it was found that the statutory language could cover not only the unusual “intact D&E” but the most commonly used procedure for second trimester abortions; “standard”

## (III) Gonzales v Carhart—2007—SCOTUS

**Challenge to the federal “partial birth abortion” ban -- Congress determined that SCOTUS in Stenberg was required to accept the questionable factual findings but Congress was not bound to them; precludes the woman from prosecution**

* There is documented medical disagreement about whether “intact D & E” is ever medically necessary-- Congress has wide discretion to legislate in areas of medical/scientific uncertainty
* Considerations of marginal safety, including balancing of risk, are within legislative expertise when the regulation is rational, in pursuit of legitimate ends, and does not impose an undue burden
* Congress sought to meet the Court’s objections by adding intent & overt act requirements; the avoidance canon extinguishes any lingering doubt about the reach of this statute -- it does not cover standard D & E and unlike the NE statute; this act clearly defines the line between criminal activity and lawful conduct
* Per *Casey*, regulations which create a structural mechanism by which the state or the parent may express profound respect for the life on the unborn fetus are permitted; undue burdens are not -- the central premise of *Casey* that government has a legitimate and substantial interest in preserving life of the fetus is affirmed

Dissent

* ***Ginsburg (4)*** -- The government cannot impose restrictions absent an exception safeguarding the women’s health -- argues SCOTUS should defer to the district court’s selection of one set of experts over others and should have found the procedure to be medically necessary in some cases -- The majority and its defense of this statute cannot be understood as anything other than an attempt to chip away at Roe

## (IV) Roberts v U.S. Jaycees—1984—SCOTUS

**Establishes framework for [Freedom of Intimate Association] consideration**

* Because the Bill of Rights is designed to secure individual liberty, certain kinds of highly personal relationships must have a substantial measure of sanctuary from unjustified interference by the state -- this safeguards the ability to independently define one’s identity which is central to any concept of ordered liberty
* The relationships are distinguished by qualities such as (1) relative smallness (2) a high degree of selectivity in decisions to begin and maintain the affiliation and (3) seclusion from others in critical aspects of the relationship
* On the opposite end of this test is large corporations-- as a general, only the above qualities are likely to reflect considerations which led to understanding freedom of association as an intrinsic element of personal liberty

## (IV) Bowers v Hardwick—1986—SCOTUS

**[Overruled in Lawrence] Challenge to criminal conviction of an adult male for committing a consensual sexual act with another adult male in his own bedroom**

* Court confirms conviction -- Framing of the issue essentially decided the case before it got started
* “The issue present is whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many states proscribing such conduct for ages”

## (IV) Lawrence v Texas—2003—SCOTUS

**TX statute criminalizes engaging in “deviate sexual intercourse” -- Δ arrested when police responded to his home for a separate incident and found him engaging in a sexual act with another man**

* Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct -- the Bowers’ court failed to appreciate the extent of the liberty at stake
  + Note: SCOTUS does not articulate this as a “Fundamental Right”
* The fact that the state has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice -- the TX statute furthers no legitimate state interest when can justify its intrusion into the personal and private life of the individual [winks & nods preferred]
* The state may not enforce religious beliefs, conceptions of right/acceptable behavior, and respect for the traditional family through the criminal law -- such is an invitation to discriminate
* *Stare Decisis Analysis*: (1) Bowers itself causes uncertainty and is unworkable because precedents before & after contradict its central holding (2) the legal foundations of Bowers have sustained serious erosion from recent decisions (when precedential foundation is weakened, criticism from other sources is of greater significance) (3) there has been no detrimental reliance comparable to instances where recognized individual rights are involved and (4) the factual/historical basis for Bowers was misinterpreted at best
* *Question*: When can moral disapproval alone suffice to pass statutes the sort that are listed in Scalia’s dissent?
  + State laws against: bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity -- Scalia argues these laws are likewise sustainable only in light of Bowers validation of laws based on moral preferences

Concurrence/ Dissent

* ***O’Connor (C-1)*** -- I joined the Bowers court and do not join in overruling it -- the statute should be invalidated under the EPC for unequal protection of homosexuals with regard to heterosexuals
* ***Scalia (D-3)*** -- Argues that under the majority formulation of stare decisis, Roe should be overruled -- “to tell the truth, it does not surprise that the court has chosen to revise the standards of Stare Decisis set forth in Casey, it has they exposed Casey’s extraordinary deference to precedent for the result-oriented expedient that it is

## (IV) United States v Windsor—2013—SCOTUS \*\*\*\*\* Move TO EPC\*\*\*\*\*

**Challenge to §3 of DOMA that provided a definition of marriage for the entire body of federal law**

* The unusual deviation from the history & tradition of reliance on state law to define marriage operates to deprive same-sex couples of the benefits and responsibilities that accompany federal recognition -- the liberty protected by the 5th Amendment contains within it a prohibition against denying equal protection of laws
* DOMA frustrates NY’s attempt to eliminate equality through a system-wide enactment with no identified connection to any particular area of federal law -- DOMA writes inequality into the entire US code
* Discriminations of an unusual character especially suggest careful consideration to determine if they are constitutional -- but note SCOTUS purposefully does not define the level of review they are using

Concurrence/Dissent

* ***Roberts (C/D-1)*** -- The majority does off course -- it is undeniable that its decision is based on federalism -- the majority disclaimer that “this holding is confined to those lawful marriages” is a logical and necessary consequence o the argument it choose to adopt -- the majority’s argument could otherwise be read to question whether the State’s may continue to exercise their “historic and essential” power to define marriage
* ***Scalia (D-4)*** -- “I promise you this, the only thing that will confine the Court’s holding is its sense of what it can get away with” -- In the majority view, this story is black and white, but the truth is more complicated

# Individual Rights: Equal Protection

## Overview (Protects Status)

“Is this an instance of purposeful race discrimination?”

14th Amendment -- ***The Equal Protection Clause*** -- No state shall “deny to any person within its jurisdiction the equal protection of laws” -- broadly speaking, EPC claims involve a challenge to laws that allocate benefits or impose burdens based on a defined class of individuals where π seeks to show that the line has been drawn in an impermissible place

* Three Questions
  + How has the government defined the group being benefited or burdened? (Means)
  + What goal is the government pursuing? What is their interest? (Ends)
  + Is their sufficient connection between the mean and the ends to justify the distinction? (Nexus)
* A classification is *overinclusive* if it disadvantages a larger class than needed to achieve the state’s purpose
* A classification is *underinclusive* if some people are not disadvantaged even though failure to include them undermines achievement of the state’s interest
* Level up/ Level Down

**Rational Basis Review**

* The lowest level of scrutiny asks “is the line the government drew related in a reasonable discernable way to the achievement of a permissible government end?
* In general, the court will consider legislation based on the proffered rationale and does not look into the true purpose
* *Takeaway*: In contrasting *Cleburne* with *Railway Express* & *Lee Optical* -- when the government grants a certain right but restricts a small group from the benefit, the action may be struck down -- where the government generally restricts a course of conduct, but allows a small group to proceed, the benefit may be upheld

*Rational Basis with Teeth -- “Animus or Discriminations of an Unusual Character”*

* Court comports to be applying rational basis, but with a not so deferential standard (Moreno, Cleburne, Romer)
* Not doctrinally a different test
  + (1) Theory is that it triggers when the government broadly offers a right, but restricts a few from receiving the benefit -- when the government broadly restricts a course of conduct, but allows a few to proceed, you get traditional rational basis and
  + (2) Theory is that it triggers when the circumscribed class has an unpopular trait or affiliation likely to reflect bias on the part of the ruling majority

**Intermediate Scrutiny**

* The middle-tier of scrutiny requires an fair and substantial relation to an important government interest
* Intermediate Scrutiny requires actual government interest to be articulated, not post hoc rationalizations created at the onset of litigation

**Strict Scrutiny**

* Discriminatory administration of facially neutral statutes -- a law may be enacted for neutral reasons and nonetheless found purposefully discriminatory through its enforcement
  + A statute may be passed for neutral reasons but administered in a discriminatory fashion unintended by the drafters or
  + A body may enact statutes that accord low-level government agents tremendous discretion with the understanding that it will be administrated by low level officials in a discriminatory manner because the purpose behind individual decisions would be hard to prove
  + *Note*: There is a requirement of state action -- which is why proving “De Jure” discrimination requires proving state action

## New York City Transit v Beazer—1979—SCOTUS

**MTA prohibition on narcotic drugs applied to persons receiving methadone, a treatment for heroin addiction; challenged as discriminatory on the poor, who are more likely to be addicts**

* Because the exclusionary line challenged does not circumscribe a class of persons characterized by an unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority

## Williamson v Lee Optical—1955—SCOTUS

**OK statute prevented opticians from fitting old glasses into new frames or supplying new lenses without a prescription -- exempted the sellers of “ready-to-wear” glasses; challenged as favoritism to certain sellers**

* The prohibition of the EPC goes no further than invidious discrimination; that against discreet and insular minorities (groups defined by immutable traits and not market choices + shut out from the political process)
* The legislature may select one phase of one problem and apply a remedy there while neglecting others or to think evils in the same field may require different remedies or reform -- that inquiry is not the court’s to make
* So long as the court can discern some reasonable purpose and the law is addressed to that problem in a rational way, it will be upheld

## US Dept of Agriculture v Moreno—1973—SCOTUS

**1971 Food Stamp Amendments excluded any households containing unrelated individuals, aimed at “hippies” -- challenge from families on public assistance sharing a house to attend a special deaf school**

* If the EPC means anything, at the very least a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest -- although every classification does not require precise math certainty, this classification is not only imprecise but wholly without any rational relation to any interest
* The claim of preventing fraud was not accepted -- the court found other elements of the act was designed to root out fraud and in practical application this provision did not operate to prevent fraud -- “the practical effect is some of the people who need it most & can not afford to alter living arrangements are shut out”
* **Dissent (Rehnquist-2)** -- It was not unreasonable for Congress to conclude it was only willing to support the basic family -- such guarantees the household exist for some purpose other than to collect federal food stamps

## City of Cleburne v. Cleburne Living Center—1985—SCOTUS

**City prohibited “homes for the insane…or drug addicts” to be built without a special permit while allowing a wide variety of other structures to be built -- city concerned with negative responses from a majority of property owners**

* Negative attitudes and fear unsubstantiated by factors properly considered in a zoning proceedings are not a permissible basis for treating a home for the mentally ill different than a nursing home -- if this were not the case, vague fears would permit some portion of the community to validate an otherwise EPC violation
* The mentally retarded are indeed different from others not sharing in their misfortune, but the difference is largely irrelevant unless the home would threaten legitimate interest in a way other usages would not
* Concurrence (Stevens) -- The word “rational” always includes elements of legitimacy and neutrality that must characterize the performance of the sovereign’s duties to govern impartially

## Minnesota v Clover Leaf Creamery Co—1981—SCOTUS

**MN law banned the sale of milk in nonreturnable plastic containers but permitted such in nonreturnable paperboard milk cartons -- challenged as arbitrary in favor of local industries; SOCTUS accepted articulated environmental interest**

* Where there is evidence reasonably supporting the classification, it will not be invalidated merely because the litigants offer evidence that the legislature was mistaken -- states are not required to convince courts of the correctness of their legislative judgments, only the reasonableness
* The litigants do not challenge the theoretical nexus between the means and ends, instead they argue that there is no empirical connection between the two -- must be theoretically possible & empirically debatable

## Railway Express Agency v New York—1949—SCOTUS

**NYC traffic regulation prohibited the operation of “advertising vehicles” except for “business notices upon business delivery vehicles engaged in the usual business/work of the owner”; not merely or mainly used for advertising**

* The EPC does not require all evils of the same type be eradicated or not at all; such is a superficial way of analyzing the problem and would lead to unworkable government
* The fact that NYC choose to eliminate this type of distraction from traffic but does not touch on what may be even greater problems relative to the end is immaterial; the legislature is free to pick a place and start there

## Village of Willowbrook v Olech—2000—SCOTUS / Oregon

**Citizen sued village for requiring a 33ft. easement to connect to the municipal water supply while others gave 15ft**

* A π may being a “class of one” claim if they allege they have been intentionally treated differently from others similarity situation and that there is no rational basis for that difference in treatment
* Note: SCOTUS has distinguished “class of one” claims when the government is acting with respect to its regulatory power over certain citizens and when the government is managing internal operations as an employer (Engquist v. Oregon Department of Agriculture [SCOTUS 2008])

## Strauder v West Virginia—1880—SCOTUS

**Challenge to jury selection excluding all blacks by statute -- Δ charged with murder**

* Express denial from the jury every man because of his race alone is denial of the equal protection guaranteed by the 14th amendment -- the EPC is meant to ensure the laws of the US shall be the same for both races
* That blacks are singled out and expressly denied by statute (i.e. by the political process and not social norms) all right to participate in the administration of law as jurors is practically a brand upon them, affixed by law, an assertion of their inferiority and a stimulate to racial prejudice that is an impediment to equal justice
  + Self-fulfilling prophecy

## Plessy v. Furguson—1923—SCOTUS

**[Overruled by Brown] Challenge to KA statute requiring separate RR cars for white and colored passengers**

* Separate but equal
* Dissent (Harlan-1) -- *In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind…In respect of civil rights; all citizens are equal before the law. The man regards man as man.* [Formal Approach to EPC]

## Brown v. Board of Education of Topeka—1925—SCOTUS

**No words needed**

* Separate educational facilities are inherently unequal -- segregation of kids in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the kids of the minority group equal protection of the laws
* Segregation on the basis of race generates a feeling of inferiority as to their status in the community and may affect their hearts and minds in a way unlikely ever to be undone

Brown II

* “All deliberate speed”

## Korematsu v United States—1944—SCOTUS

**Challenge to the WWII evacuation of Japanese Americans from the coast into the mainland of the country for fear of a Japanese invasion of the West Coast**

* Courts must immediately subject all legal restrictions which curtail the civil rights of a single racial group to the most rigid scrutiny -- for the first time articulates the rule of “strict scrutiny”
* The compelling interest is military necessity -- the court must be deferential to the military as not to second guess decisions made in the theatre of war -- the war-making branches made the determination in a critical hour
* Nothing short of the gravest imminent danger to public safety can constitutionally justify curfew or detention camps, but here that determination was made by the proper authorities with the blessings of congress

Concurrence / Dissent

* Frankfurter (C-1) -- The validity of this action under the war power must be judged wholly in the context of war; that action should not be stigmatized as lawless because it would be such in peace time

## Loving v Virginia—1967—SCOTUS

**Court invalidates VA statute making it illegal for whites to be in a relationship with blacks and vice versa -- VA Supreme Court articulated the state interest in a prior case as preserving a pure bloodline, etc.**

* EPC demands that racial classifications be subjected to “the most rigid scrutiny” and if they are to be upheld, they must have shown necessary to the accomplishment of some permissible state objective -- independent of racial discrimination, which the 14th amendment as aimed at eliminating
* The VA court’s ruling makes clear that there is no legitimate purpose independent of invidious discrimination which justifies the classification -- the purity of white blood is not

## Yick Wo v Hopkins—1886—SCOTUS

**Special permit to operate a laundry outside of brick buildings was systematically denied to Asian Americans**

* Discriminatory purpose can be inferred by systematic discrimination in administration by the executive -- here no Asian-American permit had been issued but every other application except one was granted

## Hernandez v Texas—1954—SCOTUS

**Court considers whether π, a Mexican American, may bring an EPC claim on the basis of race**

* Community preferences are not static and from time to time other differences from the community norm may define groups which need EPC protection; whether such community exist is a question of fact -- one way this may be demonstrated is by showing the attitude of the community toward the class
* When existence of a distinct class is demonstrated & it is shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the EPC has been violated

## St Francis College v Al-Khazraji—1987—SCOTUS

**π challenges continued denial of tenure as “because of” his Arab-American heritage**

* Congress intended to protect identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics -- whether or not it would be classified as “racial” in terms of modern scientific theory

## Washington v Davis—1976—SCOTUS

**Unsuccessful applicants to the police force challenge the verbal test as unconstitutionally discriminating upon them based on evidence that a higher percentage of blacks than whites failed the test**

* Cases have not embraces the proposition that a law is unconstitutional solely because a racially disproportionate impact without regard to if it reflects a discriminatory purpose -- school desegregation cases adhered to the basic principle that the invidious quality of a law must ultimately be traced to a discriminatory purpose
* The *essential element of de jure segregation is “a current condition of segregation resulting from intention state action”* -- *disproportionate impact is not irrelevant but it is not the sole touchtone of invidious discrimination* although very strong evidence of disparate impact may justify a prima facie case of invidious discrimination
* Invidious purpose may often be inferred from the totality of the relevant facts including (1) if the law bears more heavily on one race than another and (2) if the discrimination is very difficult to explain on nonracial grounds

## Personnel Administrator of Massachusetts v Feeney—1977—SCOTUS

**Veterans qualifying for civil service positions were considered ahead of any qualifying nonveterans operating overwhelmingly to the advantage of males -- challenged under the EPC**

* Discriminatory purpose implies more than intent as awareness of consequences or proof of purposeful decisions; it implies the decisionmaker selected or reaffirmed a particular course of action (atleast in part) “because of” and not merely “in spite of” its adverse effects upon an identifiable group
* Nothing in the record demonstrates this preference was devised to keep women in a stereotypical or predefined place in Massachusetts Civil Service --

## Village of Arlington Heights v Metropolitan Housing Development Corp—1977—SCOTUS

**Challenge to city’s refusal to rezone a parcel of land from a single-family to a multi-family dwelling -- established a burden-shifting framework for determining if strict scrutiny will apply to facially neutral statutes**

* Rarely can it be said a legislature made a decision with a single motivation or even that a particular purpose was “dominant” or “primary” -- but racial discrimination is not just another competing consideration to be balanced, where there is proof a discriminatory purpose has been a motivating factor, deference is no longer justified
* Proof a decision was motivated in part by a racially discriminatory purpose would not necessarily require invalidation; instead the burden shifts to the government to establish the same decision would have resulted had the impermissible purpose not been considered
* There are a number of factors which can be used to infer an invidious purpose -- (1) a clear pattern of disparate impact unexplainable on grounds other than race (2) historical background of the decision (3) the sequence of events leading to the challenged decisions (4) departures from normal procedure (5) substantive departures from the factors usually relevant in the decision and (6) legislative or administrative history

## Regents of University of California v Bakke—1978—SCOTUS

**Strict Scrutiny is applied to affirmative action programs by Justice Powell breaking a 4/4 split -- Marshall, J. (4) would have upheld under intermediate scrutiny and Burger, J. (4) would have violated under the Civil Rights Act of 1964 not reaching the constitutional question [4-1-4 Decision]**

* Powell joins Burger to hold Bakke had been unconstitutionally excluded from 16 seats but joined Marshall in refusing to enjoin all use of race in the future -- Powell would have permitted a plus system where race did not insulate the individual from comparison with all other candidates
* Plus factor programs allows flexibility which can consider all pertinent elements of diversity in light of the qualifications of each applicant -- it places all on the same footing for consideration although not necessarily according them the same wright
* Although the University’s interest in diversity could justify some use of racial criteria, it did not justify the rigid two-track system under which nonminority applicants were precluded from competing for certain seats
* The remediation of societal discrimination is not a compelling state interest -- it is too amorphous a concept of injury -- remedying the effects of past de jure discrimination is a compelling state interest

## Grutter v Bollinger—2003—SCOTUS

**Law School admissions policy of Michigan challenged -- allowed race to be considered along side other measures of diversity as part of a holistic review**

* The law school’s educational judgment that diversity is essential to its mission is one which receives deference; it is substantiated to some degree by respondents and their amici -- judicial scrutiny is no less strict for taking into account complex educational judgments in an area primarily within the expertise of the university
* The law schools concept of “critical mass” is defined by reference to the educational benefits that diversity is designed to produce -- to assure some specified percentage will be admitted would be outright balancing and patently unconstitutional
* Narrow tailoring does not require exhaustion of every conceivable race neutral alternative, it does require a serious & good-faith consideration of workable race neutral alternatives that will achieve the same result -- the alternatives would require dramatic sacrifice of diversity, quality of student, or both
* Δ’s program adequately ensures all factors that may contribute to student body diversity are meaningfully considered alongside race -- with respect to such consideration, all URM’s have been deemed equally qualified
* “Race -conscious admissions policies” must be limited in time; the duration requirement can be met by sunset provisions in race-conscious policies and periodic reviews to determine whether racial preferences are still necessary -- we expect 25 years from not the use of race will no longer be necessary
* *Note*: The 25-year sunset passage would not change the substantial state interest in diversity, but it would change wither race is a narrowly tailored means of achieving such -- the question will evolve to whether the end goal (diversity) can be met by means not using race explicitly

Concurrence / Dissent

* Concurrence (Ginsburg-2) -- It is well documented that conscious & unconscious racial bias remains alive in our land, impeding realization of our highest values/ideas--however strong the public desire for improved education, it remains reality that many minority students encounter inadequate and unequal educational opportunities
  + From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset AA
* Dissent (Scalia-2) -- Today’s split seems perversely designed to prolong this controversy -- any number of lawsuits may focus on:
  + Whether the applicant is evaluated enough “as an individual” that sufficiently avoids separate admissions tracks
  + Whether, it the particular setting at issue, any educational benefits flow from racial diversity
  + Some may challenged the institutions expressed commitment to the educational benefits of diversity -- tempting targets will be those who talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses

## Gratz v Bollinger—2003—SCOTUS

**Challenge to Michigan’s undergraduate admissions policy -- 20 points on 40 point scale for “soft variables”**

* The challenged policy does not provide such individualized considerations as the law schools’ policy -- the automatic 20 points has the effect of making race decisive for virtually every qualified URM -- not following Powell’s example where race may be considered without being decisive
* That the implementation of a program capable of providing individual consideration may present administrative challenges does not render constitutional an otherwise problematic system
* ***Dissent (Ginsberg-1)*** -- Institutions will have to result to camouflage techniques that hinder the overall process and the quality od student obtained through the use of these programs

## Fisher v Texas—2013—SCOTUS

**Challenge to the University of Texas’ admission program in which race was one factor taken into account in admitting the entering class not admitted under the “Top Ten Percent” law -- is the additional use of race justified?**

* SCOTUS reverses on narrow tailoring -- finding the district court gave too much deference to the schools’ decision -- “narrow tailoring” is a purely judicial decisions which TX receives no deference at all
* The court may consider a University’s experience/expertise in adopting/rejecting certain admissions processes, but it remains the University’s burden to demonstrate that the process “ensures each applicant is evaluated as an individual and not in a way that makes an applicant’s race the defining feature of their application
* Narrow tailoring involves a careful judicial inquiry into whether the sough benefit could be achieved without racial classifications --i.e. *examination of the “serious & good-faith consideration” of a workable race-neutral alternative; the court must ultimately find no workable race-neutral alternative would produce the same benefits*
* If a nonracial approach could promote the substantial interest in diversity about as well and at tolerable administrative expense, the university may not consider race

## Parent’s Involved in Community Schools v Seattle School District #1—2007—SCOTUS

**Challenge to Seattle & Louisville’ pupil assignment plan using race as a (1) tiebreaker and (2) in a system of balancing -- State argued that educational & broader socialization benefits flow from a racially diverse learning environment**

* Cases in the school context have recognized two interest as compelling--(1) remedying effects of past intentional discrimination (2) diversity in higher education when such is part of a highly individualized, holistic review
* The minimal effects these classifications have on student assignments suggest other means would be effective -- while we do not suggest that greater use of race would be preferable, the minimal impact cast doubt on the necessity of using racial classifications

*Kennedy’s Concurrence (5th vote)*

* The statement by Harlan, J. in Plessy’s dissent that “our Constitution is color blind” was certainty justified in context, it is regrettable to say in the real world that cannot be a universal Constitutional principle
* It is permissible to consider the racial makeup of schools in adopting general policies to encourage a diverse student body -- one aspect of which is racial composition
* There are race-conscious mechanisms that do not lead to different treatment based on a classification telling each student they are defined by race -- it is unlikely any would demand strict scrutiny to be found permissible
  + (1) Strategic site selection (2) drawing attendance zones with general recognition of neighborhood demographics (3) allocating resources for special programs and (4) targeted recruiting
* Allowing race to more directly address the issue ignores the dangers presented by such classifications not as pressing when the same ends are achieved indirectly -- If you classify by race, the government must determine what it means to be of a race -- a label the individual is powerless to change -- limiting self-definition
* Although the de jure/de facto distinction was important in the context of limiting judicial remedy, it serves as a limit on the reduction of an individual to an assigned racial identity for different treatment

## Frontiero v Richardson—1973—SCOTUS

**Court invalidates law about military benefits allowing men to claim their wives ad dependents but required female service members to prove their husbands were actually dependent before allowing additional benefits**

* This case along with *Reed v. Reed* [SCOTUS 1971] paved the way to introducing intermediate scrutiny into analysis of laws where the distinction is based on gender

## Craig v Boren—1976—SCOTUS

**OK law allowed 3.2% beer to be brought by women 18-20 but not men 18-20 -- study showed 2% of males in the group drunk and drove while only 0.18% of women did**

* *Gender classifications must serve important governmental objections and must be substantially related to achievement of those objectives* -- decisions following Reed have rejected administrative ease and convenience as sufficiently important interest to justify gender-based discrimination
* Viewed in terms of correlation, the statistical disparity is not trivial in a statistical sense, but it can hardly form the basis or employment of gender as a classification device, it suffices to say that sex does not represent a legitimate and accurate proxy for the regulation of drinking and driving
* The study merely illustrates the point that proving broad sociological propositions by statistics is a dubious business -- one inevitable in tension with the normative philosophy that underlies the EPC

**Concurrence**

* *Powell (1)* -- Our decision will be viewed by some as a “middle-tier” approach, while I do not endorse such, candor compels recognition that the relatively deferential rational basis standard takes a sharper focus when we address a gender-based classification
* *Stevens (1)* -- There is only one EPC and it requires every state to govern impartially; it does not direct courts to apply one standard of review in some cases and a different standard in other cases -- although classification is not totally irrational, there are several reasons this is unacceptable -- (1) minimal effect & (2) tenuous proxy

## United States v Virginia—1996—SCOTUS

**United States sues VMI for denying admission to women; VMI argued admission of women would require wholesale changing of training/traditions and it sought to have diverse educational opportunities available**

* Gender-based government action must demonstrate an “exceedingly persuasive” justification for that action; the state must show the challenged classification serves important government objectives & the means employed are substantially related to achievement of that purpose -- a burden which rest entirely on the State
* Estimates of what is appropriate for most women no longer justify denying opportunity to women whose talent and capacity place them outside the average description -- the justification must not rely on overbroad generalizations about different talents, capacities, or preference of males and females
  + Classifications may not create or perpetuate the legal, social, or economic inferiority of women
* In gender cases, the justification must describe actual state purposes, not post hoc rationalizations for actions in fact differently grounded -- VA has not shown that VMI was actually established or maintained with a view to diversify its education nor is the requirement of a program change been proven

**Concurrence**

* *Rehnquist (1)* -- “exceedingly persuasive justification” is a phrase best confined to where it was first used, as an observation of the difficulty of meeting the applicable test, not as a formulation of the test itself

## Romer v Evans—1996—SCOTUS

**Challenge to CO Amendment 2 -- nullifying and prohibiting all laws prohibiting discrimination on the basis of sexual orientation -- CO argued the amendment deprived homosexuals of “special rights” given by its localities and in that sense putting them on equal footing with everyone else**

* In an ordinary EPC case, a law will be sustained if it advances a legitimate government interest, even if thought unwise, the rationale seems tenuous, or it works to the disadvantage of a particular group -- by requiring a rational relationship to an independent and legitimate legislative end, we ensure classifications are not drawn for the purpose of disadvantaging the group burdened by law
* Amendment 2 is at once too narrow and too broad -- it identifies people by a single trait and denies them protection across the board -- the absence of precedent for this is instructive; discriminations of an unusual character suggest careful consideration to see whether they are obnoxious to the Constitution

*Romer v. Evans Cont. [SCOTUS 1996]*

* CO localities have not limited anti-discrimination laws to groups given heightened protection by SCOTUS -- rather they set forth an extensive catalogue of traits which cannot be the basis for discrimination including: age, military status, marital status, pregnancy/parenthood, political affiliation and in recent times sexual orientation
  + Note: This line can be used to defend heightened scrutiny for SSM -- or it could be used to argue that the court has already distinguished between those things worth heightened scrutiny and other “traits”
* Homosexuals can obtain specific protection only by enlisting the citizenry of CO to amend the constitution no matter how local or discrete the harm or no matter how public or widespread the injury -- the law therefore imposes a special disability and not deprivation of a special right
* IF the EPC means anything, at the very least, bare desire to harm a politically unpopular group cannot constitute a legitimate government interest

**Dissent**

* *Scalia (3)* -- Since the constitution says nothing about homosexuality, it should be left to be resolved by normal democratic process such as adopting a constitutional amendment -- the majority places homosexuality behind the proposition that opposition is as reprehensible as racial or religious bias; that is precisely the cultural debate
  + “This amendment represents a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of laws

## (IV) United States v Windsor—2013—SCOTUS

**Challenge to §3 of DOMA that provided a definition of marriage for the entire body of federal law**

* The unusual deviation from the history & tradition of reliance on state law to define marriage operates to deprive same-sex couples of the benefits and responsibilities that accompany federal recognition -- the liberty protected by the 5th Amendment contains within it a prohibition against denying equal protection of laws
* DOMA frustrates NY’s attempt to eliminate equality through a system-wide enactment with no identified connection to any particular area of federal law -- DOMA writes inequality into the entire US code
* Discriminations of an unusual character especially suggest careful consideration to determine if they are constitutional -- but note SCOTUS purposefully does not define the level of review they are using

**Concurrence/Dissent**

* *Roberts (C/D-1)* -- The majority does off course -- it is undeniable that its decision is based on federalism -- the majority disclaimer that “this holding is confined to those lawful marriages” is a logical and necessary consequence o the argument it choose to adopt -- the majority’s argument could otherwise be read to question whether the State’s may continue to exercise their “historic and essential” power to define marriage
* *Scalia (D-4)* -- “I promise you this, the only thing that will confine the Court’s holding is its sense of what it can get away with” -- In the majority view, this story is black and white, but the truth is more complicated

**US v. Windsor (9th Cir 2012)**

* Determines that homosexuality is a quasi-suspect class -- a conclusion that goes further than any court previously -- based on an analysis similar to that articulated by AG Eric Holder previously
  + *(1) History of Discrimination* -- criminalization of homosexual conduct
  + *(2) Relationship to Ability* -- no reasonable relation to how the group can contribute to society
  + *(3) Immutability / Distinguishing Characteristic* -- Less an “inherited” angle but distinguishing characteristic -- the more the group is identifiable by some observable trait the more we fear the legislation is assigning disapproval
  + *(4) Political Power* -- discrete and insular minority type argument

# Enforcing Individual Rights

Class notes

* One large restriction to enforcement provisions is the requirement of State Action -- the statute must be addressed at state actors prohibiting discrimination (Morrison)
  + Meaning even where Congress documents a state response to a problem that is inadequate and completely at odds with the purpose of the DPC -- Congress can not act to redress the problem under the 14th amendment
  + A statute could be written to apply to both state actors and private actors -- in this sense you could do an “as applied” assessment of part of the statute under the §5 legislative head
* Can Congress use § 5 authority to prohibit more than what the substantive provisions themselves prohibit?
* In actuality, Congress has the power to enforce the Court’s interpretation of the 14th amendment -- Congress cannot extend the contours of the amendments based on its interpretation, it must enforce SCOTUS’s 14th amendment
  + Congress must gather evidence sufficient evidence to convince the court that if challenged directly, the pattern of action would fail constitutional scrutiny -- but for categories that the Court does not give heightened scrutiny (age), Congress must show the pattern of state action would not pass muster under Rational Review -- because that would be the court’s standard
    - Kimmel, Garrett, & Hibbs show this [Cases]
  + So essentially, if you are on the TEST and see an EPC claim, you need to consider the limits of Congressional authority to enforce -- in practice, Congress receives more deference to an enforcement provision when it is protecting an interest that the Court itself gives heightened scrutiny to
* The Gregory v. Ashcroft ruling applies to this area too -- but it could be as simple as saying “no employer, public or private, shall do …..” You have to do the threshold analysis of the clear statement requirement, but once it is given then you can evaluate whether the remedy in the statute goes beyond the scope of § 5 powers
* In § 5 context -- §5 is legislatuive power to enforce the court’s exposition of rights protected by the 14th amendment -- while Congress is not required to accept judicial findings of facts in a specific case as demonstrative of the general problem (Gonzales / Partial-Birth Abortion), Congress is required to apply the legal test as formulated by SCOTUS; Congress cannot apply its own § 5 standards to determine the substantive limitations of the rights protected by the 14th amendment